TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 564.

FREDERICK DE BARY AND ADOLPH DE BARY, PLAINTIFFS IN ERROR,

vs.

CHESTER A. ARTHUR, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 20, 1875.

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1 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the circuit court, before you, or some of you, between Frederick De Bary and Adolph De Bary, plaintiffs in error, and Chester A. Arthur, defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as is said and as appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 16th day of July, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the one hundredth.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

Allowed July 16, 1875.

SAM. BLATCHFORD.

(Indorsed:) U. S. Supreme Ct. Frederick De Bary & Adolph De Bary, plaintiffs in error, vs. Chester A. Arthur, defendant in error. Writ of error. Mudgett & Nutter, attys. for plffs. in error. Filed July 16, 1875.

Due service of a copy of the within is hereby admitted.
N. Y., July 19, 1875.

GEORGE BLISS,
U. S. Atty., for Deft.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from one to 25, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Frederick De Bary and Adolph De Bary, plaintiffs in error, versus Chester A. Arthur, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this first day of October, in the year of our

Lord one thousand eight hundred and seventy-five, and of the Independence of the said United States the one hundredth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

3 U. S. circuit court for the southern district of New York, in the second circuit.

Pleas before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings, in the city of New York, of the term of April, 1873, to wit, of the 26th day of August, in the year of our Lord one thousand eight hundred and seventy-three.

Witness the honorable Lewis B. Woodruff, one of the judges of the said circuit court.

KENNETH G. WHITE, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the 13th day of August, 1873, in April term of that year, before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings, in the city of New York, came Frederick De Bary and Adolphe De Bary,
4 by Mudgett & Nutter, their attorneys, and brought into the said court, before the aforesaid judges thereof then there, their certain declaration against Chester A. Arthur, being in custody, &c., of a plea of trespass on the case upon promises; which said declaration follows in these words, that is to say:

THE UNITED STATES OF AMERICA:

Circuit court of the United States for the southern district of New York, in the second circuit, on the 13th day of August, in the year of our Lord one thousand eight hundred and seventy-three.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Frederick De Bary and Adolphe De Bary, plaintiffs in this suit, come here into court, and by Mudgett & Nutter, their attorneys, suggest and give the court now here to understand and be informed that heretofore, to wit, on the 21st day of February last past, an action was commenced in the superior court of the city of New York, according to the laws of the State of New York and the rules and practice of said court in such case made
5 and provided, in favor and in the name of the said plaintiffs against the defendant herein, upon and for the same cause of action hereinafter set forth, and the summons therein was filed in the clerk's office of the said superior court on the same day. That the defendant afterwards, by George Bliss, esquire, his attorney, duly appeared in said action, and such proceedings were thereupon had that afterwards, and on the 27th day of May, in the year of our Lord one thousand eight hundred and seventy-three, the said action was in due form of law removed by writ of certiorari for further prosecution and trial in this court, according to the act of Congress in such case made and provided; and the clerk of the said superior court did thereupon return the said writ with the summons aforesaid, and did file the same in this court according to the course and practice of this court, which allegations and suggestions the defendant does not deny but admits the same to be true.

Wherefore, let the further proceedings and trial in this action against the defendant be continued in this court.

6 And the said plaintiffs accordingly, by Mudgett & Nutter, their attorneys, complain of the defendant in this suit being in custody, &c., of a plea of trespass on the case for promises, for that whereas the said defendant heretofore, to wit, on the day of the date of this declaration, to wit, at the city of New York, in the district aforesaid, was indebted to the said plaintiffs in the sum of five thousand two hundred & eighteen and $\frac{68}{100}$ dollars, lawful money of the United States of America, for duties on certain merchandise, to wit, champagne imported into and entered at the collection-district of the United States for the city of New York, on or about the following dates, to wit: Dec. 21, 16, 28, 1872; Jany. 21, 13, & 25, 1873; Feby. 7, 13 & 20, 1873, (in the years one thousand eight hundred and 72 and seventy-three,) in the following ships or vessels, to wit: str. Holratia & various other vessels from various ports of Europe, unlawfully demanded, exacted and received at the

7 city of New York aforesaid, in the district aforesaid, by the said defendant, then the collector of the customs for the district aforesaid, under color of a law of the United States for the collection of duties on imports, and paid by the said plaintiffs under protest, in writing, in due form of law.

And being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the sum of money above mentioned when he, the said defendants, should be thereunto afterwards requested.

And whereas, also, the said defendants afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, was indebted to the said plaintiffs in the further sum of $5,218.68 *thousand dollars*, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request of the said defendant; and for other money by the said plaintiffs before that time paid, laid out, and expended for the

8 said defendant, and at the like request of the said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiffs. And being so indebted, the said defendant in consideration thereof afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs, the said sum of money in this count mentioned, when he, the said defendant, should be thereunto afterwards requested.

Nevertheless, the said defendant (although often afterwards requested so to do) has not as yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiffs *to* $5,218.68 *thousand dollars;* and therefore the said plaintiffs bring suit, &c.

9 *Plea.*

United States circuit court, southern district of New York.

CHESTER A. ARTHUR *ads.* FREDERICK DE BARY AND ADOLPHE DE BARY. } No. 2.

And the said defendant, Chester A. Arthur, by George Bliss, his attor

ney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise, in manner and form as the said plaintiffs in this suit have above thereof declared against the said defendant, and of this he puts himself upon the country, and the said plaintiffs do the like, &c.

Therefore the issue above joined is ordered by the said circuit court of the United States for the southern district of New York, in the second circuit, to be tried at the circuit court appointed to be held at the U. S. court buildings, in the city of New York, in and for the district and circuit aforesaid, on the third Monday of October, 1874.

10 And now at this day, to wit, the third Monday of October, 1874, before the judges aforesaid, at the U. S. court buildings, in the city of New York, comes the said defendant, by his attorney, George Bliss; and Nathaniel Shipman, esquire, one of the judges of the said circuit court, before whom the said issue was tried, hath sent hither his record had before him, in these words, to wit: Afterwards, that is to say, on the day and at the place within contained, before Nathaniel Shipman, esquire, one of the judges of the U. S. circuit court within named, according to the form of the statute in such case made and provided, come as well the within-named plaintiffs as the within-named defendant, by their respective attorneys, within mentioned, and the jurors of the jury summoned to try the said issue being called, also come; who, to speak the truth of the matters within contained being chosen, tried, and sworn, say upon their oath that the said defendant did not undertake and promise in manner and form as the said plaintiffs have within complained against him.

11 Therefore, it is considered that the said plaintiffs take nothing by their said declaration, but that he be in mercy, &c., and that the said defendant do go thereof without delay, &c. And it is further considered by the said court, now here, that the said defendant do recover against the said plaintiffs forty-one $\frac{37}{100}$ dollars, for his costs and charges by him about his defence in this behalf laid out and expended, by the said court here adjudged to the said defendant, and with his assent, according to the form of the statute in such cases made and provided, and that the said defendant have execution thereof, &c.

Judgment signed this 10th day of May, 1875.

R. E. STILWELL,
Dep. Clerk.

(Endorsed:) U. S. circuit court. C. A. Arthur ads. Frederick De Bary & Adolphe De Bary. Judgment record. Costs, $. atty. for deft. Filed May 10, 1875.

12 *Engrossed bill of exceptions.*

Circuit court of the United States for the southern district of New York.
In the second circuit.

FREDERICK DE BARY & ADOLPH DE BARY
vs.
CHESTER A. ARTHUR.

Afterwards, to wit, on the tenth day of December, 1874, at a stated term of this court, begun and holden at the city of New York, to wit, on the third Monday of October, 1874, before the honorable Nathaniel

Shipman, district judge of the United States for the State of Connecticut, appointed to hold the said circuit court according to the form of the statute in such case made and provided, the aforesaid issue so joined as between the said parties as aforesaid, as by the record more fully appears, came on to be tried by a jury duly empannelled and sworn for that purpose, the said plaintiffs being represented by Stephen G. Clarke,
esq., and David R. Nutter, esq., and the said defendant by H.
13 E. Tremaine, esq., and Edmund H. Smith, esq., and the trial of the cause was continued from day to day until the fifteenth day of December, 1874.

And in the course of the trial the said counsel for the plaintiffs did take and allege sundry exceptions to the rulings and charge of the court and to the refusals of the court to give certain instructions to the jury, as then and there prayed for by them, which said exceptions are hereinafter severally set forth.

To maintain the said issues on the part of the said plaintiffs, counsel for the said plaintiffs introduced evidence tending to show that the said defendant, as said collector of customs for the port of New York, upon the ascertainment and liquidation of the duties upon certain champagne imported and entered as aforesaid by the plaintiffs at said port, exacted a duty of three cents upon each bottle containing said champagne in addition to six dollars per dozen bottles, and that the plaintiffs aforesaid paid the said duty of three cents upon each bottle, under due
14 protest in writing, and appealed in due form of law and duly brought this suit within the time prescribed by law.

And thereupon the counsel for the plaintiffs called a witness qualified to testify as an expert as to the mode of manufacture of champagne, who testified:

"The grapes are gathered in the months of September & October, and pressed. Immediately the wine is put in casks and is kept in casks over winter. It is confined in the casks, and when the spring sets in, just before the annual heat commences, the wine is bottled. It is then still wine, but the saccharine matter which is contained in the wine, or in the grapes, is so strong, so powerful, that with the slightest heat it goes into fermentation, which fermentation goes on in the bottle; for, to have a bottle of sparkling wine, or champagne, the fermentation must be in the bottle; otherwise there would be none there.

"After the wine is bottled it is kept over ground until the fermentation is all over; that means until the saccharine matter has gone off, and become carbonic-acid gas. Then the sparkling character of
15 the wine is formed. It is sparkling. After that it is put down in a cool cellar, and it is kept there a number of years, according to the style of wine or the length of time it takes to get it ready. Some houses keep it two years, some three, some ten, according to the country the importer wants to ship it to, and whether he requires his wines old or not.

"After the wine has been there two years, or one year, the wine has to be fined, because all fermentation produces a sediment—a very large sediment in this case.

"That sediment settles down at the bottom of the bottle, which is in a horizontal position. That sediment has to be taken out.

"It is taken out by taking the bottle carefully and putting it on a table, and laying it on an angle, perhaps, of 40 degrees—I don't know exactly how much—and then every day the bottle is shaken so that the sediment slides down gradually and easily, without making the wine muddy, and after a month—generally 30 days—the wine being shaken every day, the sediment goes down onto the cork.

16 "The wine is perfectly clear, as it has been all the time. It does not come in contact with the sediment.

"When the sediment is all down on the cork, the cork is carefully taken out and the sediment removed.

"The fermentation having taken off all the natural sweetness of the grape, it has to be replaced in an artificial way, which is done by adding syrup, or something of that kind; then a new cork is put in, and string put over it, or wire, and it is ready for consuming. This last operation of fining wine don't take a very long time, but it takes sometimes 2, sometimes 5, sometimes 6 years to mature the wine, according to the vintage.

"One vintage may mature sooner than another, or one country may want a younger wine than another. The fermentation goes on in the bottle; it must be in the bottle. There is no champagne not in bottles, because it is impossible to make it sparkle in any other vessel except a bottle. You cannot change the vessel where it has been originally put in—where it has been made sparkling. It must be so, and cannot be otherwise.

17 "Q. And those bottles in which the wine is made sparkling are the same bottles in which it is imported?

"A. The same bottles; they can never change the bottle, because it would take away a great deal of the quality of the wine to put it in another bottle. The cork would not pop; that is, the pure, genuine champagne, of course."

It further appeared that the champagne in question was, in fact, a wine.

The foregoing is the substance of all the testimony in the case.

And thereupon the counsel for the defendant introduced no testimony to prove the said issue on his part.

Whereupon the counsel for said defendant moved the court to instruct the jury to find a verdict for the defendant.

And thereupon the counsel for the plaintiffs moved the court to instruct the jury to render a verdict for the plaintiffs.

And thereupon the court instructed the jury to render a verdict for the defendant.

18 Thereupon the counsel for the plaintiffs did then and there, on behalf of the said plaintiffs, except to the decision of the court instructing the jury to render a verdict for the defendant, and did also then and there except to the refusal of the court to instruct the jury to render a verdict for the plaintiffs. And because none of the said exceptions so offered and made to the opinion, instructions, and decisions of the court do appear upon the record of the said trial; therefore, on the prayer of the said plaintiffs, by their counsel, the said judge has to this bill of exceptions put his seal this day of , 1875.

N. SHIPMAN, *Judge.* [L. S.]

(Endorsed:) U. S. circuit ct. for the southern district of New
19 York. Frederic De Bary & al. vs. Chester A. Arthur. Engrossed bill of exceptions. Filed Apr. 22, 1875. Mudgett & Nutter, plffs'. attys.

Within bill of exceptions is hereby settled by consent.
1st Apr., 1875.

GEORGE BLISS,
U. S. Atty.
MUDGETT & NUTTER,
Attys. for Plffs.

20 Supreme Court of the United States.

FREDERICK DE BARY & ADOLPH DE BARY,
pliantiffs in error,
vs.
CHESTER A. ARTHUR, DEFENDANT IN ERROR.

Of October term, in the year of our Lord one thousand eight hundred and seventy-five.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the said Frederick De Bary and Adolph De Bary, by Mudgett & Nutter, their attorneys, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit, that the said judge, presiding at the said trial, upon the close of the testimony, should have granted the prayer of the plaintiffs, and also that the said judge erred in directing a verdict for the defendant.

21 And the said Frederick De Bary and Adolph De Bary pray that the judgment aforesaid may be reversed, annulled, and altogether held for nought, and that they may be restored to all things which they have lost by occasion of the said judgment.

MUDGETT & NUTTER,
Attorneys for Plffs. in Error.
S. G. CLARKE, *of Counsel.*

(Endorsed :) U. S. Supreme Court. Frederick De Bary et al., plffs. in error, vs. Chester A. Arthur, deft. in error. Assignment of errors. , attys. for plffs. in error. Filed Augst. 6th, 1875.

22 *Joinder in error.*

Supreme Court of the United States.

FREDERICK DE BARY AND ADOLPH DE BARY,
plaintiffs in error,
against
CHESTER A. ARTHUR, DEFENDANT IN ERROR.

And afterwards, to wit, on the second Monday of October, in October term, in the year of our Lord one thousand eight hundred and seventy-five, the said Chester A. Arthur, by George Bliss, his attorney, freely comes here into court and says that there is no error, either in the record or proceedings aforesaid, or in giving the judgment aforesaid, and he prays that the said Supreme Court of judicature, before the justices thereof now here, may proceed to examine as well the record & proceedings aforesaid as the matters aforesaid assigned for error, & that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

GEORGE BLISS,
U. S. Attorney, for Defendant in Error.

23 (Endorsed :) U. S. Supreme Court. Frederick De Barry & another, plffs. in error, vs. Chester A. Arthur. Joinder in error. George Bliss, U. S. atty. Filed Aug. 20, 1875.

24 *Bond for costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

FREDERICK DE BARY AND ADOLPH DE BARY, plaintiffs in error,
vs.
CHESTER A. ARTHUR, DEFENDANT IN ERROR.

Know all men by these presents that we, B. F. Mudgett and D. R. Nutter, residing at No. 28 East 23d st., in the city of New York, are held and firmly bound unto the above-named Chester A. Arthur in the sum of two hundred & fifty dollars, to be paid to the said Chester A. Arthur; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the 24th day of June, in the year of our Lord one thousand eight hundred and seventy-five. Whereas the above-named Frederick De Bary and Adolph De Bary have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named Frederick De Bary and Adolph De Bary shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

B. F. MUDGETT.
D. R. NUTTER.

Sealed and delivered, and taken and acknowledged, this 24 day of June, 1875, before me.

JOHN A. SHIELDS,
U. S. Comisr. S. Dist. N. Y.

25 UNITED STATES OF AMERICA,
Southern District of New York, ss:

B. F. Mudgett, of 28 East 23d st., in the city of New York, and D. R. Nutter, No. 28 East 23d st., same city, respectively, being duly sworn, doth depose and say, each for himself, that he is worth the sum of five hundred dollars over and above all his just debts and liabilities, besides property exempt by law from execution.

B. F. MUDGETT.
D. R. NUTTER.

Sworn to this 24th day of June, A. D. 1875, before me.

JOHN A. SHIELDS,
U. S. Commisr. S. Dist. N. Y.

(Indorsed:) Vol. , page . U. S. circuit court. Frederick De Bary & Adolph De Bary, plffs. in error, vs. Chester A. Arthur, deft. in error. Bond for costs on writ of error. Mudgett & Nutter, proctor' for plff. in error. Filed this 16 day of July, 1875.

The within bond approved as to form and sufficiency of sureties. July 16, 1875.

SAML. BLATCHFORD.

26 UNITED STATES OF AMERICA, *ss:*

To Chester A. Arthur, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Frederick De Bary and Adolph De Bary are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Blatchford, judge of the district court of the United States for the southern district of New York, 16th day of July, A. D. 1875.

SAML. BLATCHFORD.

(Indorsed:) U. S. Supreme Court. Frederick De Bary & Adolph De Bary, plaintiffs in error, vs. Chester A. Arthur, defendant in error. Citation. Mudgett & Nutter, attys. for plffs. in error. Original.

Due service of a copy of the within is hereby admitted.

N. Y., July 19, 1875.

GEORGE BLISS,
U. S. Atty., for Deft.

(Indorsement on cover:) No. 564. Frederick De Bary and Adolph De Bary, plaintiffs in error, vs. Chester A. Arthur, collector of the port of New York. Filed 20th November, 1875.

REC. 564—2

C

In the Supreme Court

OF THE UNITED STATES,

OCTOBER TERM, 1876.

FREDERICK DE BARY, ET AL.,
Plaintiffs in Error,

vs.

CHESTER A. ARTHUR, *Collector, &c.,*
Defendant in Error.

No. 564.

In error to the Circuit Court of the United States, for the Southern District of New York.

BRIEF FOR PLAINTIFFS IN ERROR.

STEPHEN G. CLARKE,
Of Counsel for Plaintiffs in Error.

New York:
SAMUEL HAMILTON'S SONS, PRINTERS, 61 Cedar Street, N. Y.

1876.

In the Supreme Court

OF THE UNITED STATES,

October Term, 1876.

FREDERICK DE BARY and ADOLPH DE BARY, *Plaintiffs in error*, *vs.* CHESTER A. ARTHUR, Collector, &c.	No. 564.

In error to the Circuit Court of the United States for the Southern District of New York.

BRIEF FOR THE PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

In section 21 of the act of July 14, 1870 (16 stat. at L. 262, 263), it is enacted as follows:

"On all wines imported in casks, containing not more than twenty-two per centum of alcohol, and valued at not exceeding forty cents per gallon, twenty-five cents per gallon; valued at over forty cents, and not over one dollar per gallon, sixty cents per gallon; valued at over one dollar per gallon, one dollar per gallon, and in addition thereto twenty-five per centum *ad valorem*.

"On wines of all kinds, imported in bottles, and not otherwise herein provided for, the same rate per gallon as wines imported in casks, but all bottles containing one quart, or less than one quart, and more than one pint, shall be held to contain one quart, and all bottles containing one pint or less shall be held to contain one pint, and shall pay in addition three cents for each bottle.

"On champagne, and all other sparking wines, in bottles, six dollars per dozen bottles, containing each not more than one quart, and more than one pint; and three dollars per dozen bottles, containing not more than one pint each, and more than one half pint; and one dollar and fifty cents per dozen bottles, containing one half pint each, or less; and in bottles containing more than one quart each, shall pay, in addition to six dollars per dozen bottles, at the rate of two dollars per gallon on the quantity in excess of one quart per bottle: *Provided*, That any liquors containing more than twenty-two per centum of alcohol, which shall be entered under the name of wine, shall be forfeited to the United States. *And provided further*, That wines, brandy, and other spirituous liquors, imported in bottles, shall be packed in packages containing not less than one dozen bottles in each package, and all such bottles shall pay an additional duty of three cents for each bottle."

The question presented by the record, and arising under this statute is: What rate of duty is imposed upon "champagne in bottles"? *More specifically*: Is the duty of six dollars per dozen bottles imposed upon "champage in bottles" in this act exhaustive and complete, or did Congress advisedly, while enacting a specific rate of duty by the dozen bottles for champagne in bottles, also by this act, impose a duty of thirty-six cents

for each dozen bottles in addition to the six dollars per dozen specifically named?

Facts.

It appeared, upon the trial, that the plaintiffs imported champagne in bottles, upon which the defendant, in addition to a duty of six dollars per dozen bottles, exacted three cents for each bottle (Record). Against this exaction plaintiffs duly protested, appealed, and in due time brought this action, (Record).

Plaintiffs further proved that, in a certain sense, champagne is manufactured, and that the champagne does not, and cannot exist without the bottles, (Record .)

In the language of one witness (Record), "The fermentation goes on in the bottle, it must be in the bottle; there is no champagne not in bottles, because it is impossible to make it sparkle in any other vessel except a bottle; you cannot change the vessel where it has been originally put in where it has been made sparkling; it must be so, and cannot be otherwise.

"Q. And those bottles in which the wine is made sparkling are the same bottles in which it is imported?

"A. The same bottles; they can never change the bottle, because it would take away a great deal of the quality of the wine to put it in another bottle; the cork would not pop, that is the pure genuine champagne, of course."

Errors Assigned.

The Court erred in refusing to direct a verdict for the plaintiffs, and in directing a verdict for the defendant. Upon the undisputed testimony in the case, the plaintiffs were entitled to recover.

In addition to the provision of the statute hereinbefore quoted, and now before the Court for construction, and preliminarily, and as throwing light upon that construction, I call the attention of the Court to other provisions of the statutes, and to prior and subsequent legislation upon similar questions.

The same section before quoted provides a duty of two dollars per proof gallon "on brandy and other spirits," and on "cordials, liqueurs" and other similar spirituous beverages, with the proviso "that any brandy or other "spirituous liquors imported in casks of less capacity "than fourteen gallons shall be forfeited."

The Act of July 30, 1846, 9th statutes, 42, imposed a duty in the following words, in Schedule B: "Wines, "Burgundy, Champagne, Claret, Madeira, Port, Sherry, "and all other Wines and imitations of Wines." This classification or statutory description remained in force until the passage of the Act of March 2, 1861, 12th statutes, 178. This Act imposed an *ad valorem* duty on "Wines of all kinds;" but the Act of June 30, 1864, 13th statutes, 202, in section 12, while imposing certain rates of duty by the gallon, and also *ad valorem* on "wines of all kinds," contained this proviso: "Provided that no champagne or sparkling wines in bottles shall pay a less rate of duty than six dollars per dozen bottles." Then after provisions for duties upon brandy, &c., followed a proviso that "all bottles shall pay a "separate duty of two cents each, whether containing "Wines, Brandies or other spirituous liquors subject to "duty as hereinbefore mentioned." The proviso in the Act of 1864, just referred to, allowed brandy or other spirituous liquors to be imported in bottles when the package should contain not less than one dozen, but in 1866, by the Act of July 28th of that year, 14th statutes, 328, this provision was repealed, the first section of that Act containing this proviso:

"*Provided*, That brandy and other spirituous liquors may be imported in casks or other packages of any

capacity not less than thirty gallons, and that wine in bottles may be imported in boxes containing not less than one dozen bottles of not more than one quart each; and wine, brandy, or other spirituous liquor imported into the United States, and shipped after the first day of October, eighteen hundred and sixty-six, in any less quantity than herein provided for, shall be forfeited to the United States."

The effect of these provisions was, that when the statute of 1870 was enacted, wines of all kinds, including champagne, paid duty upon the same basis, viz.: a varying specific duty by the gallon, and a varying *ad valorem* duty, both increasing with the foreign value per gallon. Brandy and other spirituous liquors paid a duty by the gallon, and must be imported in packages of not less than 30 gallons. The duty on champagne was by the gallon and *ad valorem*, the same as upon other wines, and the proviso before quoted, to wit: "Provided that no champagne or sparkling wines in bottles shall pay a less rate of duty than six dollars per dozen bottles," only took effect in cases where the foreign cost per gallon was not sufficient, calculating according to the value per gallon, to bring the duty upon the quantity contained in 12 bottles up to six dollars; in case the duty exceeded six dollars by such method of calculation, the proviso was of no effect.

It needs no argument to show this, but in fact that that exact question, if question there be, has been passed upon in this Court in the case of Bollinger's Champagne, 3 Wallace, 560, in which case Mr. Justice Nelson, delivering the opinion of the Court, says:

"It will be perceived that the duty imposed by the Tariff Act of June 30th, 1864, is both specific and *ad valorem;* and, according to the proviso, as it respects champagne or sparkling wines, in bottles, of a given quantity in each, not less than six dollars per dozen, or six dollars per two dozen, as may be the quantity, shall be imposed as the duty. The effect of the proviso is, that if the specific duty upon the gallon, and the *ad valorem* duty on the appraised value in the aggregate,

as it respects the article of champagne or sparkling wines, as the case may be, in bottles, exceed the sum of six dollars per dozen or two dozen, the rate thus estimated will be the duty imposed; but if the rate falls under the sum of six dollars, then, by virtue of the proviso, less than that sum shall not be exacted."

The true construction of the provisions of the Act of 1866, it is submitted, would have prohibited an importation of brandy in bottles, and for awhile that construction was given to the Act by the Treasury Department, and many seizures were made. Subsequently, however, the department in Treasury Circular No. 8 of May 18, 1869 (Synoptical Series, 1869), for the relief of the mercantile community, gave the following construction to this provision: "Doubts having arisen as to the proper construction of Section 1 of the 'Act to protect the Revenue and for other purposes,' approved July 28, 1866, so far as said Act relates to the importation of brandies and other spirituous liquors."* * * * * *

"If brandies or other spirituous liquors are contained immediately in casks which are not in another outside covering or case, the casks must be of thirty gallons capacity or larger; if such liquors are contained immediately in bottles, casks, or other vessels of less than thirty gallons capacity, or if put up in cases of bottles, the cases being of less than that capacity, such bottles, casks, other vessels or cases, must be contained in another closed vessel or case of a capacity in cubical contents equivalent to thirty gallons or more."

Up to the time of the passage of the Act of 1870 *duty was not assessed upon champagne by the bottle or by the count of any number of bottles.*

For the purpose of construction the general intent and scope of an Act to be derived from admitted evils in existing statutes and from the construction given them, as well as the general intent and purpose of the Legislature, to be gathered from the Act itself, is, it is submitted, a legitimate and pertinent subject of inquiry. Defects and difficulties in practical operation in the existing statutes

are apparent from the simple statement which has been made of them.

The Act of 1870 was passed after the excessive taxation required to carry on the war against rebellion was no longer necessary. It was the avowed intent of Congress, by the passage of this Act, to reduce taxation. Its title is "An Act to reduce Internal Taxes and for other purposes." The first twenty sections reduced or abolished altogether the then existing special taxes, licenses and excises; the two following sections modified duties upon imports, in the main reducing them, and largely increased the free list. The remaining sections of the Act contain provisions manifestly for the relief of or to facilitate trade and commerce. So that we may well say, gathering the intent from the Act alone, that Congress purposed by its passage, to relieve commerce from unnecessary or burdensome regulations, and inferentially to facilitate, so far as was practicable, having regard to the necessities of the revenue, the trade and commerce of the country.

I ask the Court to bear this manifest intent in mind, giving it its due and proper weight in construing the clauses of the statute under consideration, and in applying the argument upon their true construction, which we shall submit. I also ask the Court to bear in mind, while applying the argument, that the Act of 1870, unlike the prior Acts, imposes a specific duty upon champagne *in bottles*, and by the tale of the bottles, the exact language being, "On champagne and all other sparkling "wines in bottles six dollars per dozen bottles contain-"ing each not more than one quart and more "than one pint." And the further fact, derived from the record, that champagne, as an article of commerce, is unknown except in a bottle; that it is manufactured in the bottle; that in the bottle in which it is manufactured it is, and of necessity must be, imported into this country; that in that bottle it is and of necessity must be, sold to the retail dealer and to the consumer, and that in that bottle it appears and of necessity must appear, if it appear at all, upon the table of the consumer; and we ask the Court to bear in

mind that champagne out of the bottle ceases to be champagne for any commercial purpose; in that condition it is either at once consumed or loses its entire value, and is only fit to be thrown away. I shall submit, then, that the bottle being indispensable in the manufacture, such bottle is not a mere factitious and incidental envelope or containing vessel, but is, in fact, a component part of the article itself, and no more to be divested or separated from the fluid than the skin of the horse can be removed, leaving it a living horse, perfect and fit for use; and the act providing a duty upon champagne in bottles, there can be no champagne in the dutiable category, unless the bottle is present. In other words, a bottle is a component part of a bottle of champagne, and the statute imposing a duty by the dozen on "champagne in bottles," is tantamount to imposing a specific duty upon a dozen bottles of champagne.

This Court recognizes judicially the well settled practice of the Treasury Department. Smythe *vs.* Fiske, 23 Wallace, 382.

Under such well recognized practice of the Treasury Department; the covering, or containing envelope or package of dutiable goods paying a strictly specific duty is not itself dutiable even though it may have, when the contents are disposed of, in itself an appreciable commercial value.

That no question may arise upon this point we add, provided such containing package or envelope is the ordinary one in which the particular goods are usually sent to market. Thus no duty is imposed on the casks in which brandy is imported; or on the jute bags in which many East Indian products paying specific duties, are received, although such casks or bags, if imported separately, would be liable to duty. I submit that this is a recognition of the fact, that an article having, so to say, a personality of its own, may yet become such a necessary incident to the existence or in the importation of another article, as to become merged and lost in it for all revenue purposes. Thus, although the duty on wines imported in casks is

by the gallon, nevertheless the cask containing such wine comes in free of duty, or without other duty than that accruing upon the number of gallons contained in such cask. It would require a positive enactment to render the cask liable to duty.

No question of this has ever arisen, except in the case of salt in bags where the containing bag was of one fifth or more of the value of the whole importation, but the Circuit Court, Taney, *C. J.* delivering the opinion, held to the doctrine above stated, announcing the general principle that—"*The charge of a specific duty upon an article in a particular form or vessel is a charge upon the whole article, as described, including the vessel or material described as containing it.*" Karthaus *vs.* Frick, Taney, 94.

I submit further that a duty being imposed upon it by the dozen bottles, the importation of champagne in that form was permissable, and it would have been entitled to entry at the Custom House without necessity for further legislation. In other words, whenever a duty is imposed upon a particular article by name, or by descriptive terms, or upon an article in a particular form the article so named or described, or in the particular form specified, may be imported without further legislation authorizing its importation; so that, without any other legislation, whatever might have been the state of the pre-existing law, an importer would have been at liberty to bring a case of twelve bottles of champagne into this country, and to have entered it at the Custom House.

Chief Justice Taney, in Brewer *vs.* Blougher, 14th Peters, 178, 198, in laying down rules of interpretation says: "It is undoubtedly the duty of the Court to ascer-"tain the meaning of the legislature from the words used "in the statute, and the subject matter to which it relates, "and to restrain its operation within narrower limits than "its words import, if the Court is satisfied that the "literal meaning of its language would extend to cases "which the legislature never designed to embrace in it.'

This is but another manner of stating the fundamental rule that the intent of the legislature should be followed, but this intent is not to be arbitrarily assumed by the Court. It is to be derived from the language used in the particular phrase to be construed, qualified, however, by the context, by the general purview of the statute, by its subject matters, and by other statutes *in pari materia*. "The office of interpretation is to bring sense out of the "words used," but at the same time interpreting all parts of the statute, so as, if possible, to render it harmonious. In the words of my Lord Coke, to "so expound, that one part of the act may agree with the other, and all stand together."

The Court will have observed that some of the enactments to be construed and interpreted are by way of proviso. Says Mr. Justice Story in Minis *vs.* The United States, 15 Peters, 423, 445.

" The office of a proviso, generally is either to except something from the enacting clause, or to qualify, or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview. A general rule applicable to all future cases, would most naturally be expected to find its proper place in some distinct and independent enactment."

And again, the same judge in The United States *vs.* Dickson, 15 Peters, 141, 165.

" When the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is strictly construed, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exceptions must establish it as being within the words as well as within the reason thereof."

In construing tariff acts, it seems to be a general rule that where specific terms are used, the article so specified is removed from the operation of general or descriptive terms which might otherwise embrace it, or, as expressed by Mr. Justice Davis, in Reiche *vs.* Smythe, 13 Wallace,

162, 164. "It is fair to presume in case a special "meaning were attached to certain words in a prior tariff "act, that Congress intended they should have the same "signification when used in a subsequent act in relation "to the same subject matter." The same doctrine was applied in Homer *vs.* The Collector, 1 Wallace, 486. Commercially almonds come within the general term "Driedfruit," but a duty having been imposed upon them *eo nomine* as almonds it was held that they were not affected by subsequent legislation as to "Dried fruit." See also on this point—

Roosevelt *vs* Maxwell, 3 Blatchf., 391; United States *vs.* Irwin, 5 McLean, 178, 181.

The proviso, by force of which the Collector claims to have legally assessed the duty complained of is as follows: "That wines, brandies and other spirituous liquors imported in bottles shall be packed in packages containing not less than one dozen bottles in each package, and all *such* bottles shall pay an additional duty of three cents for each bottle."

My first point in the interpretation of this proviso is; that the word "wines" as therein used refers only to those wines mentioned in the earlier part of the sections as paying duty by the gallon.

Upon the principle before adverted to a duty having been imposed on champagne *eo nomine* champagne is thereby for tariff purposes taken out of the catogory of wines; and the generic term "wines" having been so used by Congress in one part of the Statute as to exclude champagne it must be deemed to have been used in the same sense in other portions of the same statute.

Besides the case of Homer *vs.* The Collector before cited to the case of Reiche *vs.* Smythe is an authority upon this point. There the case was that the Act of 1861, in schedule of articles exempt from duty contained this clause—"Animals, living, of all kinds, birds singing and other, and land and water fowls."

The Act of 1866 imposed a duty upon "All horses, mules, cattle, sheep, hogs and other live animals." Thereupon

the Collector of New York assessed duty upon an importation of canaries and other birds "as live animals;" in which he was sustained not only by the Department but by the Circuit Court. This Court, however, held that the birds were free of duty, not because the term "live animals" was not comprehensive enough to include them, but because Congress in the earlier act, while using the general term "living animals," had used the more specific term, "birds singing and other" and had thereby, for revenue purposes, removed birds from the catogory of "living animals," and that a simple repetition of the general term was not sufficient to impose a duty upon the birds which had been specifically mentioned in connection with the general term. The latter statute had to be interpreted in the light of the former, and the intent of Congress arrived at by consideration of all the language used in both statutes.

Analyzing the section a little more in detail, the first provision is for a duty on all wines imported in casks. The next is a provision for a duty on wines of all kinds in bottles, and not otherwise therein provided for. Then a duty upon champagne in bottles by name. So far, it is clear that champagne is not included by the provisions for wines. In this case the greater does not include the less, the general term the specific. The specific article is provided for *eo nomine*. Then comes the proviso before referred to, which uses the term "wines," and does not use the term "champagne." Now, unless the word "wines" in the proviso, in this instance, is to be held to include champagne, then the duty complained of is not imposed; but to hold that the word "wines" in the proviso includes champagne is to give to that word a broader and more comprehensive meaning than Congress gave to to it in the earlier clauses of the same statute. Is there anything inherent in the nature of the case to require the ordinary rule of interpretation to be violated in order that this broader significance may be given it? I submit that there is not. On the contrary, the legitimate inference are all the other way. Note that the word "all," which is used in connection with the

term "wines" in the earlier portion of the statute, is omitted, simply the word "wines" being used. This word also is used in connection with the phrase "brandy and other spirituous liquors," the significance of which connection is, that as I have already shown, under a fair construction of the statute, brandy is not to be imported in bottles, and under the forced construction of the Treasury Department, only in an expensive and inconvenient manner, and the first enactment of this proviso making it fill the appropriate office of a proviso, is to allow the various named fluids, "wines, brandies and other spirituous liquors," dutiable not as champagne is dutiable, by the bottle, but by the gallon, when imported in bottles, to be so imported, provided they are packed in a particular manner. Now, the duty imposed upon bottles by the latter clause of the proviso is upon "*such* bottles;" that is, the bottles which by the earlier portion of the proviso are permitted to be imported and filled with wine, brandy, and other spirituous liquors. Now there was no need for this permission as applied to champagne. Note also that the phrase "imported in bottles" is used in this proviso in apparent contradistinction to the phrase "imported in casks," in the earlier portion of the statute, again leading the mind to the conclusion that the same wines are intended by the proviso as were intended in the earlier enacting clauses.

Again going over the different provisions of the statute, both in the enactment and in the proviso is found the same phrase "wines *imported* in bottles," while as to "champagne" the enactment is "on champagne in bottles," omitting the word "imported;" so, also, in the earlier enacting clause the phrase "imported in casks" is used, and both these phrases, "imported in casks," "imported in bottles" are descriptive of the manner in which the same article is or may be brought. On the other hand, the phrase "champagne in bottles" is descriptive of the article itself. From the former phrases, "wines imported in casks," and "imported in bottles," it is to be inferred that the importation may be in different containing vehi-

cles, indiscriminately, in bottles or casks; while the phrase "champagne in bottles" shows Congress to have been advised of the fact established by the record that champagne is and can only be imported in the bottle in which it is manufactured. Therefore, the repetition of the word "imported" in the proviso in connection with the words "wines and brandies" refers the previous word "wines" in that proviso to the same word used in the previous enacting clause in connection with the same word "imported," and shows that it is used in the same sense. If so, again, by this independent process of reasoning, is champagne shown not to be embraced in the term "wines" as that term is used in the proviso under consideration. Again, examining the proviso next precedent to the one under consideration, which reads that "any liquors containing more than 22 per cent. of alcohol entered under the name of wine" shall be forfeited; in connection with the enacting clause providing a duty on all wines containing not more than twenty-two per cent. of alcohol, I submit that the term "wine," as there used, does not embrace champagne, for to hold that champagne, if in fact the article known to commerce by that name, was forfeitable by the force of this provision, if upon analysis it was shown to contain 23 per cent. of alcohol, would be to violate every established rule for the construction of Tariff laws. If, then, the term "wine" in this proviso does not embrace the wine specifically known as champagne, by what process of reasoning can the same term wine in the next proviso be made to include it?

To illustrate the argument drawn from the use of general and specific terms, let us suppose a statute imposing duties to have enacted as follows:

Cotton shirting of all kinds, three cents per square yard; Wamsutta shirting, four cents per square yard, provided that all cotton shirting exceeding thirty-six inches in width, shall pay two cents per square yard additional.

It appearing that Wamsutta shirting was a well

known article of commerce, made of cotton, and always forty inches in width, would it be claimed that it paid six cents per square yard?

And yet this supposed case is the present one. On "all wines imported in casks;" on "wines of all kinds imported in bottles;" on "champagne in bottles," provided that "wines imported in bottles shall pay three cents additional for each bottle." No, it is speciously answered, the cases are not parallel; the duty is on the bottle, and it makes no difference whether it contains champagne or other wine. To which we reply: the duty is on "champagne *in bottles*," and that the bottle is as much covered by this provision as if it read, "on bottles containing champagne," and as is the extra four inches on Wamsutta shirting in the supposed case. The shirting would not be Wamsutta if it was less than forty inches wide. The champagne would not be the champagne provided for unless in the bottle.

Congress imposes a duty on wine by the gallon with a proviso that if it comes in a particular package, the package shall also pay duty. A duty is imposed on champagne by the *tale* of the package in which it is customarily and necessarily contained, to wit, by the bottle; and it is sought to extend the proviso imposing a duty on the bottles in which other wines may be imported to the bottles in which champagne *must* be imported. The parallel between the two cases consists in this: that an article within the general term used being itself provided for by its specific name, is not affected by a proviso which repeats the general term and does not otherwise name the specific. And it is no answer to argue that the duty is upon the bottles; because it is only upon "such bottles" as contain the specified wines whatever they may be.

But the Government seeks to impose this additional duty by force of a proviso. In the language of Justice Story, before quoted, where the enacting clause is general in its language and objects, and the proviso is afterwards introduced, that proviso is strictly construed, and takes

no case out of the enacting clause which does not fall fairly within its terms. The enacting clause as to the article in question here is general, and the object is general, namely: a duty upon champagne by the dozen bottles. It is on champagne in bottles, and to accrue, the champagne must be in bottles when imported. The additional duty claimed is sought to be justified by a proviso, which if it has given to it the construction claimed by the Government, will be the setting up of an exception to the general rule that where the duty is specific, that duty covers the usual containing vessel or envelope. The enacting clause covers by this imposition of duty both the fluid and the containing bottles, and would have done so if the words "in bottles" had been omitted, but these words being inserted, the construction and the intent is manifest. Is it, then, within either the words or the reason of the proviso that it must be held to apply to the champagne in bottles, upon which a full and exhaustive duty had been enacted. Wines, except champagne, brandy and spirits, had been made dutiable by the gallon as imported in casks. Congress seeing fit to permit their importation in bottles at the same rate of duty per gallon as wine imported in casks, the bottles having a certain value of their own, as an offset or proviso, for reasons which satisfied Congress, imposed a duty on the bottles. Earlier statutes had accomplished, in a different manner, the same results. Thus, the Act of 1832, 4 Statutes, 589, charged a specific duty of six cents a gallon on red wines in casks, and ten cents a gallon on white wines in casks; while in bottles the same wines, both red and white, were charged 22 cents per gallon.

So, in the act of 1875, while an uniform duty of 40 cents a gallon is imposed upon wines in casks, the same wines, when imported in bottles, pay a duty of $1.60 per case, which is 60 cents in excess of the gallon duty, but the same reason did not exist for putting a duty upon the bottles containing champagne, because Congress had already imposed a specific duty upon the champagne in bottles, and by the bottle, and because Congress knew

that champagne could only be imported in the bottle. The meaning of a phrase in a proviso is not to be extended, unless the case comes within the same reason. A like reason is not sufficient. United States *vs.* Freeman, 3 Howard, 556, 564, 566. The case of the United States *vs.* Dickson, 15 Peters, 141, is of value as illustrative of the strictness with which a proviso is construed.

Now, the claim of the government in the present case is, that the statute should be interpreted as though it read "Champagne in bottles, $6 per dozen bottles, provided that each of such bottles shall pay an additional duty of 3 cents," but it does not so read. The enactment is perfect and complete when it says "Champagne in bottles, $6 per dozen bottles." The duty is not upon the champagne separate and distinct from the bottles. It is not upon it by measure or value, but is upon it by count, and in and inclusive of the bottle, because the words "in bottles" are descriptive of the article on which the duty is imposed. Supposing the proviso, after the words, "and all such bottles" had contained this phrase; "And all wines produced or manufactured in bottles shall pay an additional duty of 10 per centum *ad valorem*." Would or could such proviso be construed as imposing an additional duty of 10 per centum *ad valorem* on champagne, it appearing upon the trial that other wines than champagne were produced or manufactured in bottles. To so construe it would violate the principles of construction before referred to applicable to provisos.

Upon this point then, we submit the proviso relating to wines imported in bottles does not control or modify the enactment relative to champagne in bottles, but that it had reference to wines, brandies, &c., that might be imported in other vessels than bottles, and applied to such wines, brandies, &c., when imported in bottles, and to no other, and these wines are the same wines mentioned earlier in the statute, and which, as we have seen, did not include champagne.

My second distinct point is, that the enactment pro-

viding a duty upon champagne in bottles provides, under well recognized principals of law, a duty not alone upon the fluid, but upon the containing bottle. The practical rule of construction of the Treasury Department upon this point has been already stated, and upon this point the express decision of Chief Justice Taney in the Circuit Court for the District of Maryland, in the case of Karthaus *vs.* Frick, Taney's Decisions, 94, ever since its promulgation in April, 1840, acquiesced in by the government, is clear and conclusive. The act of July 14, 1832, 4 Statutes, 589, in the 17th clause of the second section imposed this duty on salt: "10 cents per 56 pounds." It appeared, from the evidence, that for many years Liverpool Salt had been imported altogether in bags or sacks containing 4 bushels; that such salt was worth about $2.00 wholesale, and the bags, when emptied and washed, were worth from 25 to 50 cents each. For several years no additional or separate duty was imposed upon the bags, but in 1839 a different rule was adopted, and the Collector, the defendant in this case, charged an *ad valorem* duty on the sacks as manufactures of hemp, in addition to the specific duty charged upon the salt. Says the Chief Justice: "It appears from the clause in the law above quoted, imposing this duty, that no difference is made in the amount of it, whether the salt is imported in bulk or in bags. It is moreover, a specific duty of ten cents upon the *fifty-six* pounds, without any reference to the value of the article. Inasmuch as it was the established custom at the time this law was passed, always to import the fine salt in bags, Congress must be presumed to have been fully apprised of it, and to have legislated with a full knowledge of the usual course of trade.

The material in which merchandise is usually packed for the purpose of secure and convenient transportation has not in general been the subject of a separate impost. When the vessel containing the article is also a subject of commerce the specific duty has been made higher upon the merchandise thus imported in consideration of the value of the vessel that contains it, but we are not aware

of any instance in which a separate *ad valorem* duty has been laid upon the vessel or receptacle in which it is contained when a specific duty is laid upon the merchandise. Thus, for example in the twenty-third clause of the second section the red wines of France in casks are charged with a specific duty of six cents per gallon, white wines in casks ten cents per gallon, and all French wines in bottles 22 cents per gallon. The duty, it will be observed, in this clause, is laid upon the wine in the bottles and not upon the bottles containing it; but in the twenty-first clause of the same section there is also a specific duty upon bottles, yet it has never been supposed that in addition to the duty imposed upon the wine imported in bottles the separate duty imposed upon the bottles in the twenty-first clause was also to be levied.

So, in the case before us, if the law had said, "Upon salt imported in sacks and upon salt imported in bulk," ten cents per fifty-six pounds, it would have been evident that the sacks were not liable to an additional duty as manufactures of hemp, for the same reason that bottles do not pay a duty in addition to that imposed upon the wine imported in them. The charge of a specific duty upon an article in a particular form or vessel is a charge upon the whole article as described, including the vessel or material described as containing it.

It is true that in in this case the law does not, in express terms say that the duty of ten cents per fifty-six pounds is imposed upon *salt in bags* and *salt in bulk;* but at the time the law was passed it was the established course of trade to import fine salt in sacks, and as the duty is imposed generally upon every fifty-six pounds of salt, it must be understood to mean salt imported in the manner then usual, and, consequently, to refer to salt in bags as well as in bulk, and receive the same construction as if both modes were expressly mentioned".

So Curtis, Justice, in Barnard *vs.* Morton, 1st Curtis. C. C., 404, 412, distinguishing between the effect of an *ad valorem* duty and a specific duty says: "It differs also "entirely from the case of a duty expressly levied upon "the article in such packages as upon wine in bottles,

"and from the case of specific duty upon salt, as under "the Act of 1832;" and, to a similar effect, see The United States *vs.* Newman, Crabbe, 499, 513.

If then, the duty, as I submit it is, is clear, specific and exhaustive, and covers not only the fluid champagne but the bottle which contains that fluid, to impose an additional duty upon the fluid or upon the bottle, the language used by Congress must be clear and unequivocal, and susceptible of no other fair interpretation, or the intent of Congress as gathered in a legitimate manner from the entire act and from other acts in *pari materia*, must be equally clear and unequivocal.

What, then, is the intent of Congress as gathered in this way, because if there is no ambiguity in the language, if the clear intent of Congress not to impose a duty of more than $6 a dozen bottles on champagne is manifest, then it is the duty of this Court to give effect to that intent, and to so construe the statute that the intent of Congress shall be carried out.

I have already in effect argued that Congress in imposing a duty upon champagne in bottles by the dozen bottles, manifestly intended to enact a complete provision both for the contained fluid and the containing vessel. That the fluid and the bottle are as inseparably joined in the enactment as they are by nature in the process of manufacture, and that this intent is manifest from the words used as well as from the well-recognized and well known general rules applicable where the duty is specific.

But let us look further. The Act provides that where the bottles contain more than one quart each, that in addition to $3 per dozen bottles, duty shall be assessed at the rate of $2 per gallon on the quantity in excess of one quart per bottle. The language used upon this point is plain and explicit: So many dollars per dozen bottles, depending on the size, except when in bottles containing more than one quart each, then the excess above one quart per bottle shall pay the specific duty of $2 per gallon. Now, is not this provision for a duty of

$2 per gallon under certain circumstances declaratory, and must not the Court reasonably infer it to have been the intent of Congress that the basis of so many dollars per dozen bottles is in whole or part derived from this basis of $2 per gallon for the fluid? Can any reason be suggested for imposing a different, a higher or a lower rate of duty upon the contents of a bottle, whether it contains less than one quart, exactly one quart, or more than one quart? The provisions for pints and half pints indicate conclusively that no discrimination in this particular was made or intended. If in quarts $6; if in pints $3; if in half pints $1 50. The rate is fixed just in proportion to their varying measure. In this manner the importer is called upon to pay just the same rate of duty on the contents of the bottle whether the packages are one size or another. The basis, then, of computation is $2 per gallon.

Now, it is a fact well known, known to this Court, known to Congress, recognized in the statutes, and in the decisions, that twelve champagne bottles do not contain three gallons, but only contain two and a half gallons. Taking, then, our basis of gallon computation, and what is the result? That the amount of fluid in twelve bottles of champagne would be assessed only five dollars, thereby leaving one dollar as the duty that Congress intended to, and in fact did charge upon the bottles themselves when it provided an enactment which covered both the fluid and the bottles.

As to the effect of the word "imported" as used in connection with the word "wines" in the earlier enacting clauses of the section, and also in the proviso, and as confirming the view which I have urged that this word is used in description of the form of importation, and refers in either case to the wines which may be imported in different methods, in the cask or in the bottle, and not to the act of bringing from a foreign country to our own; I call attention to the enacting clause of the 21st section, which reads as follows: (16 statutes 262), "After "the 31st day of December, 1870, in lieu of the duties "now imposed by law on the articles hereinafter enum-

"erated or provided for, *imported* from foreign coun-"tries, there shall be levied, collected, &c." There was, therefore, no sense in using the words "imported" except descriptively, as I say they were used. No occasion or reason existed for enacting that the duties were to be imposed on wines imported, in order to show that the duties were to be assessed on imported wines. That had already been done in the 21st section, at the commencement of the section. Therefore it is clear that the word "imported" as used in connection with "wines," is descriptive as to the form of package or vessel containing the wines in which they are brought to this country, and in that sense there is no occasion for its use, unless it refers to a variety of wine that may be brought in some other method than in bottles, which we have seen cannot include champagne, and is another evidence of what was the intent of Congress. A similar use of the word "imported" is found in the proviso to the clause in this statute fixing the duty on liqueurs, cordials, &c.

Again, considering the provisos of this act, we find that brandy and other spirituous liquors are not to be imported in casks of less capacity than 14 gallons, and that wines, independent of the proviso immediately under consideration, might be brought in a single bottle, and that there was doubt under the existing statute as to whether brandy and other liquors could be imported in cases, and if brought in cases under the treasury instructions, great inconvenience and expense was occasioned to the importer. Taking these provisons and the state of the law together, in connection with the historical facts relative to smuggling across the Canadian frontier, the main object and intent of the proviso is clear. The statute says: "If you import wines or liquors ordinarily brought in casks, in bottles, you must pack in packages containing not less than one dozen bottles," the effect of which proviso was to limit the method of the importation of wines, and to enlarge the method of the importation of brandies, and bring the two to an uniformity; and in connection with the limitation upon small sized casks of brandy, the

object was to stop the bringing in of this class of wines and liquors in single bottles or small runlets. The prime first object of the proviso was to accomplish this purpose. It is true that a duty upon the bottle containing the wines had already been provided for, but no such duty had been provided for in respect to bottles which might contain brandies or other liquors, and Congress in using briefly the words "such bottles," although in terms including the wines which had been provided for in the earlier paragraphs, had in mind only such wines because the apparent manifest object in naming the "wines" in the first paragraph of the proviso, was to limit and prescribe the package in which they might be imported. Applying this reasoning to the whole of the proviso, we arrive at an explanation, construction and application of it in all its parts, without disturbing the specific and complete provisions as to champagne in bottles. There was a reason for limiting the number of bottles in the package in which still wines, brandies and other spirituous liquors shall be imported, a reason which does not exist as to champagne. It might have been more accurate for Congress, instead of the phrase "such bottles," to have expressly limited it to bottles containing brandy and other spirituous liquors; but that would be a hard construction, which would impose duties to be paid by the great mercantile interests of this country, by reason of inelegance in the language used by the draughtsmen of acts of Congress; still if Congress had used different language, there would have been a loophole through which bottles in which Vermuth and several other bitters, provided for further on in the section, would have escaped the duty of 3 cents a bottle; because Vermuth, which is, in fact, a wine, being provided for in a different paragraph, the bottles containing it would not have been dutiable by force of the provision for bottles in the paragraph, relative to "wines of all kinds imported in bottles, and *not otherwise herein* provided for."

Such construction of the statute, and such action of Congress is directly in line of the remarks of Taney, C. J., in the case before cited, that when the vessel contain-

ing the article is also a subject of commerce, the specific duty has been made higher upon the merchandise thus imported in consideration of the value of the vessel that contains it. The action of Congress, too, in the passage of the act of February 8, 1875, 18 Statutes, part 3, page 307, is in entire harmony with these views. This statute enacts as follows: "On all still wines imported in casks "40 cents per gallon. On all still wines imported in "bottles $1.60 per case of one dozen bottles, containing "each not more than one quart; and more than one pint, "or 24 bottles, containing each not more than one pint, "and any excess beyond those quantities found in such "bottles, shall be subject to a duty of 5 cents per pint, "or fractional part thereof, but no separate or additional "duty shall be collected on the bottles. *Provided*, that "any wines imported containing more than 24 per cen- "tum of alcohol, shall be forfeited to the United "States."

Now, here 40 cents per gallon is the normal gallon duty, but upon wine in bottles a duty of $1.60 is assessed upon a number of bottles that contain only two and one-half gallons of wine, leaving 60 cents as duty in fact upon the bottles. The imposition of five cents per pint on the excess of quantity, is exactly in accordance with our argument in relation to the $2 per gallon upon the excess in champagne, for 5 cents per pint is exactly 40 cents per gallon, the normal rate of duty established for still wines; but there having been undoubtedly imposed by the act of 1870, a separate duty upon the bottles which contained wines of the character referred to in this statute; out of abundant caution, Congress specifically repealed that duty, illustrating again the rule that we have before contended for, that where specific terms are used general terms will not ordinarily affect the specifically enumerated article.

This act of 1875 preserves substantially the duty upon the bottle that was, in fact, exacted before upon the class of wines most ordinarily imported in bottles, namely: those under the old act paying 60 cents per gallon. Under the arbitrary measure established by that act, the

duty upon a case of 12 bottles was $2.16, namely. $1.80 for the wine, and 36 cents for the bottles; but taking the actual measure of 2½ gallons, and we have $1.50 as the actual duty imposed upon the wine, and 66 cents as the duty in fact upon the bottles, which accords substantially with the duty of 60 cents, which is, in fact, imposed as the bottle duty by the act of 1875. From this consideration we find that while the rate of duty upon all still wines is reduced by the act of 1875 on the wine itself, yet the rate of duty upon the bottles is substantially preserved, although it is declared by that act that no separate duty shall be imposed upon the bottles, and this simply because the duty on the bottles had already been imposed by the enactment providing for a duty of $1.60 per case; just the same, we submit, as a duty had been imposed by the act of 1870 on the bottles containing champagne, in the provision of $6 per dozen bottles upon champagne in bottles. The language of the act of 1870 is, "$6 per dozen bottles, containing not more "than one quart, and more than one pint." The language of the act of 1875 is, "$1.60 per case of one dozen "bottles, containing each not more than one quart."

In effect the language is the same. Now, in view of the undoubted and undisputed intent of Congress in the act of 1875, and in view of the almost exact similarity of the language used in the two acts, can there be any doubt as to what Congress intended in the provisions of the act of 1870 in relation to champagne, and that Congress intended, and in fact did impose a duty not alone upon the contained fluid, but upon the containing bottle, and if so, can there be any doubt that the construction contended for should be given to the proviso, and that it should be limited to other wines than champagne, to wit: the wines which may be indiscriminately imported in casks or in bottles.

The conclusions from the whole argument, then, I submit, are that in the provisions for duty upon champagne in bottles Congress provided a full and complete enactment, covering not alone the fluid champagne, but the bottle containing it, and that, so legislating, Congress

must be deemed to have recognized the existing fact that in commerce champagne and the bottle in which it is produced are always joined together; and that, while other wines may be imported indiscriminately in casks, or tin cans, or skins of leather, or bottles, or any other vehicle capable of containing fluid, yet champagne, as known to commerce, is always found in a bottle; that the other provisions of the statute, including those of the proviso which have been considered, have relation entirely and exclusively to wines which are not manufactured or produced in a bottle, but which may be articles of commerce, either in casks or in bottles; that the use of the word imported in connection with these wines as a descriptive term makes clear this meaning; and that, by the well recognized rules of construction heretofore adverted to, the interpretation contended for, both as to the enactment and as to the proviso, must be held the correct one:—but that, over and beyond this, the intent of Congress, as gathered not alone from these provisions, but from all the provisions of the statute, from the prior legislation, and particularly from the Act of 1875, as a legislative interpretation is clear and manifest, and that intent was that "Champagne in bottles" should pay the prescribed duty without any additional charge of a separate duty upon the bottle which contained the champagne.

I have appended a statement of, or extracts from, a few cases illustrative of the principles contended for.

STEPHEN G. CLARKE,

Of Counsel for Plfs. in error.

ILLUSTRATIVE CASES.

UNITED STATES *vs.* DICKSON, 15 PET. 141.

In this case, Dickson had been a receiver of public money, and he claimed that for the fraction of a year between the 22 Nov., 1835, and the 26 July, 1836, he was entitled to retain $2500 as commissions the statutebeing, "they shall receive an annual salary of $500 each, and a commission of one per cent. on the moneys received; provided always, that the whole amount which any receiver of public moneys shall receive, under the provisions of this act, shall not exceed for any one year the sum of $3000." Dickson in the fraction of the year had received $250,000; and it was held that he was entitled to retain one per centum, or $2500; the Court saying in interpreting the proviso.

"The commission is on the moneys received by any one officer, not by one or more officers—during any one year of his services, not during any one calendar year, for the services of one or more officers of that year. It is his compensation for clerk hire, paid by him, and for his responsibilities in receiving, keeping, and transmitting the public moneys, and not for his services and responsibility in connection with other officers. The commission is a compensation attached to the particular officer for his yearly services, and not to the office itself for a fiscal year. If the intention of the legislature had been what the arguement for the United States supposes, the language of the proviso would have been different; it would have been, provided that the United States shall not, in any one calendar year, pay more than one per centum upon all the moneys received during that year; and that the commission of any one year, to whomsoever paid, shall not, in the whole, exceed the sum of $2500. It need not be said, how entirely different in its scope and legal intendment such language is from that of the present proviso; and yet the argument is, that the Court shall give them precisely the same interpretation. We cannot

but think that this is to call upon the Court, not to expound the act as it is, but to frame its provisions anew, upon a conjecture of what might have been the original intention and objects of Congress."

BENSUSAN *vs.* MURPHY, 10 BLATCH. 530.

B. imported 444 bottles of wine containing 83¼ commercial gallons, and of the dutiable value of $96. The 21st section of the Act of July 14th, 1870 (16 U. S. Stat. at Large, 262), provides that wines imported in casks valued at not exceeding 40 cents per gallon, shall pay 25 cents duty per gallon; valued at over 40 cents per gallon and not over $1, shall pay 60 cents, and valued at over $1, shall pay $1, and in addition thereto, 25 per cent. *ad valorem;* and that wines imported in bottles shall pay "the same rate per gallon as wines imported in casks, but all bottles containing one quart, or less than one quart and more than one pint, shall be held to contain one quart; and all bottles containing one pint or less shall be held to contain one pint, and shall pay in addition, three cents per bottle." The wine with all charges cost $96, and there was in fact but 83¼ gallons. The collector exacted a duty on 111 gallons, at $1 per gallon, and a duty of 25 *per cent. ad valorem* on $96, and a duty of three cents on each bottle. In a suit by B. to recover back an excess of duty, *held*, that the wine being imported in bottles, was not liable to the 25 *per cent. ad valorem* duty, but only to the duty per gallon; that, as each bottle contained more than one pint, and not more than one quart, each bottle must be held to contain one quart, and the 444 bottles must be held to contain 111 gallons, for the purpose of arriving at its value per gallon, to ascertain the proper rate of duty per gallon, as well as for the purpose of fixing the number of dutiable gallons; that the value therefor was over 40 cents, and not over $1 per gallon, and the proper rate of duty per gallon was 60 cents on 111 gallons; and that the bottles were each subject to three cents duty.

UNITED STATES *vs.* FREEMAN, 3 HOWARD 556.

In this case Wayne, Justice, in delivering the opinion of the Court, construing a statute of the Unite dStates, remarks as follows: "The correct rule of interpretation is, that, if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts, *in pari materia*, are to be taken together as if they were one law. Long, 30; 2 Term Rep 387, 586; 4 M. & Selw. 210. If a thing contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute; Lord Raym. 1028; and if it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. Morris *vs.* Mellin, 6 Barn. & Cress. 454; 7 Barn. & Cress., 99. Whenever any words of a statute are doubtful or obscure, the intention of the legislature is to be resorted to in order to find the meaning of the words. Wimbush *v* Tailbois, Plowd. 57. A thing which is within the intention of the makers of the statute, is as much within the statute as if it were within the letter. Stowell *v.* Zonch, Plowd, 366. These citations are but different illustrations of the rule, that the meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed—the limitation of the rule being that, to extend the meaning to any case not included in the words, the case must be shown to come within the same reason upon which the law-maker proceeded, and not only within a like reason. This Court has repeatedly, in effect, acted upon the rule; and there may be found, in the reports of its decisions cases under it, like the cases which have been cited from the reports of the English Courts. In 4 Dall., 14, "The intention of the legislature, when discovered, must prevail; any rule

of construction declared by previous acts to the contrary notwithstanding." In 2 Cranch, 33, "A law is the best expositor of itself—that every part of an act is to be taken into view for the purpose of discovering the mind of the legislature," &c., &c. In the case of the United States *v.* Fisher, *et al.*, assignees of Blight, in the same book, p. 386, the Court said, "It is, undoubtedly, a well-established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole," &c. In 2 Pet., 662, "A legislative act is to be interpreted according to the intention of the legislature, apparent upon its face. Every technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the legislature." In Paine's C. C. Rep., 11, "In doubtful cases, a Court should compare all the parts of a statute, and different statutes *in pari materia*, to ascertain the intention of the legislaure." So in 1 Brockenb, C. C. Rep., 162, in the construction of statutes, one part must be construed by another, in order to test the legislative intention the whole statute must be inspected."

UNITED STATES *vs.* WIGGLESWORTH, 2 STORY, 368.

In this case Justice Story says, page 373.

"In the first place, it is, as I conceive, a general rule in the interpretation of all statutes, levying taxes or duties upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters, not specifically pointed out, although standing upon a close analogy.

"In every case, therefore, of doubt, such statutes are construed most strongly against the government, and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import. Revenue

statutes are in no just sense either remediel laws or laws founded upon any permanent public policy, and, therefore, are not to be liberally construed. Hence, in the present case, if it be a matter of real doubt whether the intention of the act of 1841 was to levy a permanent duty on indigo, that doubt will absolve the importer from paying the duty beyond the period, when it would otherwise be free"

ROOSEVELT *vs.* MAXWELL, 3 BLATCH., 391.

In this case which arose under the Tariff Act of 1846, Ingersoll, J., in his opinion, page 395, says:

"In the Act of 1846 very few of the articles of glassware are specified. In Schedule B, 'glass cut' is provided for, and that is the only kind of glass provided for in that schedule. That was to pay a duty of 40 *per cent.* No other kind of glass is provided for until we come to Schedule C. 'Glass cut' having been provided for in Schedule B, no other provision was required for that. No subsequent general provision, even if it were without qualification, would include that. In Schedule C the provision is, 'manufactures, articles, vessels and wares of glass, or of which glass shall be a component material, not otherwise provided for,' which are to pay a duty of 30 *per cent.* This general provision, even without the qualification, would not embrace 'glass cut,' for that had been disposed of. The 'not otherwise provided for' refers, therefore, to some other kind of glass to be provided for in the subsequent part of the Act which the framers of the law thought would be included in the general provision unless it was otherwise provided for. And in looking at the subsequent schedules we find in Schedule E, 'window glass, broad, crown, or cylinder,' set down as subject to a duty of 20 *per cent.*, and thus 'otherwise provided for.' There is no article set down in any schedule after Schedule C, which, by any construction, could be included under the terms "manufactures,

articles, vessels and wares of glass,' unless 'window glass, broad, crown, or cylinder,' is included under those terms."

WILLIAMS *vs.* PRITCHARD, 4 D. & E., 2.
EDDINGTON *vs.* BORMAN, IBID, 4.

The act of 7 Geo. 3., c. 37, declared that certain lands to be embanked from the Thames should be "free from all taxes and assessments whatsoever." A general land tax was imposed and assessed on these lands under 27 Geo. 3., and also a rate was imposed by and assessed under 11 Geo. 3. The terms of these last statutes were broad enough to include the property in question, but the Court held them to be free of the tax. Lord Kenyon saying: "It cannot be contended that a subsequent Act of Parliament will not control the provisions of a prior statute, if it were intended to have that operation; but there are several cases in the books to shew that where the intention of the legislature was apparent, that the subsequent act should not have such operation, there, even though the words of such statute, taken strictly and grammatically, would repeal a former act, the Courts of law, judging for the benefit of the subject, have held that they ought not to receive such construction."

KITCHEN *vs.* SHAW, 6 AD. AND E., 729.

The statute of 6 G. 3., c. 25, provided that "if any artificer, calico printer, &c., &c., laborer, or other person shall contract with any person whomsoever, for any time or times whatsoever, and shall absent himself from service before the term of his contract shall be completed," such person shall be punished. It was held, Denman, *C. J.*, delivering the opinion, that this statute did not apply to a domestic servant. In the opinion he says:

"The stat. 5 Eliz. c. 4, is not only confined to certain classes of servants, but it expressly excludes domestic servants. The eleventh negative qualification in sect.

4 is thus worded; "nor being lawfully retained in household, or in any office, with any nobleman, gentleman, or others, according to the laws of this realm." If any statute *in pari materia* had been designed to do away this limitation, one should naturally expect that this would have been effected by plain words. Now the statute 6 G. 3., c. 25, entitled, "An Act for better regulating apprentices, and persons working under contract," is introduced by no general preamble. The first clause applies a remedy to the evil therein recited, the injustice practiced on several manufacturers of this kingdom by apprentices, who leave their service as soon as they become useful in it. The preamble of the fourth section is thus worded—"And whereas it frequently happens that artificers, calico printers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, laborers, *and others*, who contract with persons for certain terms, do leave their respective services before the terms of their contracts are fulfilled to the great disappointment and loss of the persons with whom they so contract; for remedy whereof, but it further enacted" that, "if any artificer" (followed by the same list as before,) "*or other person*, shall contract with *any person whomsoever* for any time or times whatsoever," &c. Large as these words undoubtedly are, when we apply to them the ordinary rules for construeing acts of parliament laid down by Mr. Dwarris, (part ii. vol. ii.) and acted upon in all times, but nowhere more clearly stated than by Lord Tenterden in Sandiman *v.* Breach, we find ourselves compelled to say, that the *other persons* are not all persons whatever who enter into engagements to some for stated periods, but persons of the same description as those before enumerated; and that the generality of the words must have been so restricted, even though domestic servants had not been excepted from stat. 5 Eliz. c. 4."

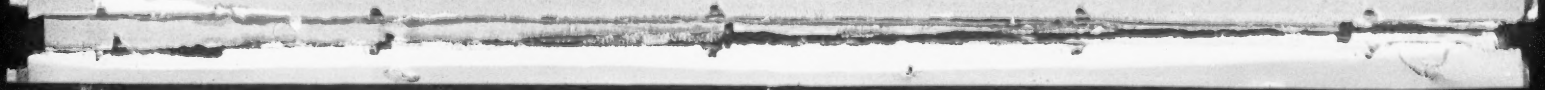
SANDIMAN *vs.* BREACH, 7 B. & C., 96.

In this case, although by the Statute of 3 Car. 1, C. 1,

it was enacted that "no carrier with any horse, nor wagonman with any wagon, nor carman with any cart, nor wainman with any wain, nor driver with any cattle, shall, by themselves or any other, travel on the Lord's Day," and by the 29 Car. 2, C. 7, that "no tradesman, artificer, workman, laborer or other person or persons shall do or exercise any labor, business or work of their ordinary callings upon the Lord's Day," it was held, that none of these terms used in the connection they were, broad as they might be, included the owner or driver of a stage coach.

HAWKSWORTH CASE. EASTS P. C. CHAP. 19, § 45.

On an indictment for forgery the defence was that the instrument being on unstamped paper was by another act invalid and inadmissible in evidence. But the Court said "That the stamp act in saying that a bill without a stamp shall not be pleaded or given in evidence, or be available in law or equity, means only that it shall not be made use of to recover the debt," and the prisoner was sentenced.



In the Supreme Court of the United States.

OCTOBER TERM, 1876.

FREDERIC DE BARY ET AL.
vs.
CHESTER A. ARTHUR, COLLECTOR. } No. 564.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for the Defendant.

In the Supreme Court of the United States.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE DEFENDANT.

STATUTES.

The act of July 14, 1870, c. 255, § 21, 16 Stats., 262–3, provides "that, after the 31st day of December, 1870, in lieu of the duties now imposed by law on the articles hereinafter enumerated or provided, imported from foreign countries, there shall be levied, collected, and paid, the following duties and rates of duties, that is to say:" * * * * "On all wines containing not more than 22 per cent. of alcohol, and valued at not exceeding 40 cents per gallon, 25 cents per gallon; valued at over 40 cents, and not over $1 per gallon, 60 cents per gallon; valued at over $1 per gallon, $1 per gallon, and in addition thereto 25 per centum *ad valorem*.

"On wines of all kinds, imported in bottles, and not otherwise herein provided for, the same rate per gallon

as wines imported in casks; but all bottles containing one quart, or less than one quart and more than one pint, shall be held to contain one quart, and all bottles containing one pint or less shall be held to contain one pint, *and shall pay in addition 3 cents for each bottle.*"

"On champagne and all other sparkling wines, in bottles, $6 per dozen bottles, containing each not more than one quart and more than one pint, and $3 per dozen bottles containing not more than one pint each and more than one-half pint; and $1.50 per dozen bottles containing one-half pint each or less; and in bottles containing more than one quart each, shall pay, in addition to $6 per dozen bottles, at the rate of $2 per gallon on the quantity in excess of one quart per bottle." * * * * "*And provided, further*, That wines, brandy, and other spirituous liquors imported in bottles shall be packed in packages containing not less than one *dozen* bottles in each package; AND ALL SUCH BOTTLES SHALL PAY AN ADDITIONAL DUTY OF THREE CENTS FOR EACH BOTTLE." * * * * (16 Stats., 263; R. S., 466–7, title xxxiii, schedule D.)

STATEMENT.

Under this statute, the defendant, then and now collector of customs at the port of New York, assessed and collected the duty of 3 cents per bottle upon certain bottles, in which the plaintiffs had there imported champagne, the sum thus exacted amounting to $5,218.68, which the plaintiffs paid under protest, and brought this suit to recover it. This champagne was, in fact, a wine. After hearing the testimony of an expert witness as to the manufacture of champagne—which he said could only be made sparkling in the bot-

tle, and in no other vessel, and could not be drawn from it into another without spoiling—the court (each party moving for an instruction to find a verdict in its favor) instructed the jury to find for the defendant; and to this instruction, and to the refusal to instruct in their favor, the plaintiffs excepted, and now assign the same for error.

BRIEF.

The admitted fact in this case, upon which the ruling now complained of was based, is that the champagne in question was a wine. (Record, 6, folio 17.) All champagne purports to be wine, though it may sometimes ill deserve the name. Not only in ordinary parlance, but in scientific nomenclature, and *as a commercial designation*, it is so known. (3 Wall., 115, 145, 560.) See act of June 30, 1864, c. 171, § 2, (13 Stats., 203,) where it is provided that in no case shall the duty be less than $6 per dozen bottles. (Bollinger's Champagne, 3 Wall., 560.)

The act of March 2, 1861, c. 68, § 6, (12 Stats., 180,) provides that "*all* bottles shall pay a separate duty, according to the rate established by this act, whether containing wines, brandies, or other spirituous liquors, subject to duty as hereinbefore mentioned;" showing the purpose to be to raise a revenue from this source, and, incidentally, to protect the home manufacturer of bottles. To the same end, the act of July 14, 1862, c. 163, § 2, last three lines, (12 Stats., 544, bottom,) provided that "*all bottles containing wines subject to ad valorem duties* shall be liable to and pay the same rate of duty as that fixed upon the wines therein contained." Champagne was then subject to an ad valorem as well as to a specific duty. (3 Wallace, 561–3.) So, under that

act, the intent was clear to tax the bottles in which it was imported.

From the earliest tariff down to that now in force, there has always been a discrimination as to the duty laid upon different kinds of wines and between the same kind when imported in casks or bottles; whether this bottling was optional or *ex necessitate* does not appear to have been considered. The statute of July 4, 1789, c. 2, § 1, (1 Stats., 25,) laid 18 cents a gallon on Madeira and 10 cents a gallon upon all other wines; on ale, &c., in casks, 5 cents per gallon; in bottles, 20 cents per dozen; and on all glass, ("except black quart-bottles,") 10 per centum ad valorem; and on such bottles (as non-enumerated,) 5 per centum. (*Id.*, 26.) August 10, 1790, c. 39, § 1, (*Id.*, 180,) a tariff making more particular specification of different wines, and increasing the duty, was approved, raising the duty on glass, with an exception as above, to 12½ cents ad valorem. The act of May 2, 1792, c. 27, § 1, (*Id.*, 259,) further particularized the kinds of wine and changed the rates. In its twelfth section (*Id.*, 262,) it declares a forfeiture of all beer, &c., brought in packages containing less than six dozen bottles.

The act of January 29, 1795, c. 17, § 3, last clause, (1 Stats., 411,) provided "that *bottles in which any liquor is imported shall be subject to the payment of the like duty as empty bottles.*"

The second section of the act of May 13, 1800, c. 66, (2 Stats., 84,) contained a recast of the classification of wines, in which champagne was enumerated; as it was in that of April 27, 1816, c. 107, which again distinguished between bottled ale, wine, &c., and that imported otherwise than in bottles. (3 Stats., 311, 313.)

Same in act of July 13, 1832, c. 227, § 2, item 23, (4 Stats., 589,) and in that of September 11, 1841, c. 24, § 4, (5 Stats., 464–5.)

In the general revision of the tariff which became a law August 30, 1842, c. 270, § 5, item 3, (5 Stats., 553,) a duty of $3 a gross was imposed upon bottles holding not more than one quart, &c. The fifth item of section 8 of that act, (5 Stats., 559–560,) specifies the duty laid upon the various kinds of wine, putting "on champagne wines 40 cents a gallon," and discriminating between wine in casks and wine in bottles, and then has a proviso "*that when wines are imported in bottles, the bottles shall pay a separate duty, according to the rate established by this act.*" This must refer to all those wines specifically enumerated in that same section.

The tariff act of July 29, 1846, c. 74, § 11, schedule B, (9 Stats., 44,) imposed a duty of 40 per cent. ad valorem on all wines, without distinction; which was reduced to 30 per cent. by the general clause of the act of March 3, 1857, c. 98, § 1, (11 Stats., 192.)

Having gone over the pertinent provisions of the various tariff acts passed prior to the entry of the plaintiff's importations, we would also call attention to the later act of February 8, 1875, c. 36, § 2, (18 Stats., Part 3, p. 307,) as tending to elucidate the congressional intention, if aught can make plainer the unambiguous language of the act and section to be construed. Congress and the courts recognize the well-known distinction between "still" and "sparkling" wines, (3 Wallace, 563.) Their latest action on this subject, above cited, declares that there shall be levied and paid "on all *still* wines imported in casks, 40 cents per gallon;" and "on all *still* wines imported in bottles, $1.60 per case of one dozen

bottles, containing each not more than one quart and more than one pint; or twenty-four bottles, containing each not more than one pint; and any excess beyond those quantities found in *such* bottles, shall be subject to a duty of 5 cents per pint or fractional part thereof, *but no separate or additional duty shall be collected on the bottles*," (18 Stats., 307.) The first line of the next section (3) at top of page 308, gives the privilege of withdrawal from bond, at these rates, to "all imported wines *of the character provided for in the preceding section.*" So, if the previous statute applied to bottles containing sparkling wines, and if the duty was properly exacted from these plaintiffs, it is still in force, and every importation now made of sparkling wines is subject to pay this 3 cents a bottle. How large a contribution this is to the Federal revenues may be conjectured from the fact that this one firm paid, on this account, over $5,000 in three months. (Record, 3, folio 6.)

To be ready at the day designated for hearing this cause, this brief is prepared before seeing that of the plaintiffs, so we can only surmise the grounds upon which this action was instituted and the writ of error sued out. Judging from the statement in the record that the only testimony offered to show the assessment illegal related to the mode of manufacturing champagne, we suppose the claim rests upon the fact, thus made to appear, that it can only be fermented and prepared for market in the identical bottles in which it is subsequently imported; and upon the distinction made in the existing and in several of the previous tariff acts (hereinbefore cited) between wine in casks and wine in bottles. It will be argued that the discrimination should apply only to those wines in regard to which the im-

porter has the power to elect whether it shall be introduced into this country in casks or in bottles, and not to that which can come in no other way than in the bottles, which are, in effect, a part of the machinery of manufacture. In short, this argument creates two distinct articles for revenue purposes, to wit, wine generally, and "wine in bottles." While the suggestion of the necessity of retaining in use, till the moment of consumption, the bottles into which the unfermented juice of the grape is first poured, might fairly be presented to the legislators to influence their action, we do not perceive that it ever has had that effect, or that it can properly affect the construction of the section under consideration.

The first tariff laid a specific duty of 18 cents a gallon on Madeira and 10 cents a gallon on *all other* kinds of wine, (1 Stats., 25.) The next act specifies two qualities of Madeira, Sherry, and then lays 20 cents a gallon on all "other wines." That of May 2, 1792, (1 Stats., 259,) adds to the specification one or two other wines, designated by their places of production, and subjected to specific rates, (but not naming champagne,) and then places a duty upon "all other wines, 40 per centum ad valorem." That of January 29, 1795, requires the same duty as that imposed upon empty bottles to be paid upon those "in which *any* liquor is imported." (*Ib.*, 411.) That of May 13, 1800, (2 Stats., 84,) laid 45 cents a gallon on "Burgundy, *Champaign*, Rhenish, and Tokay wine;" making no difference between the still wines and the sparkling wine. The only change made by the next act, (3 Stats., 313,) was to increase the duty to a dollar a gallon upon these same wines, owing to the increased expenditures caused by the then recent war with Eng-

land. The act of 1832, (4 Stats., 589,) made a discrimination as to the wines of different nations, placing "on the wines of France, namely, red wines, in casks, 6 cents a gallon; white wines, in casks, 10 cents a gallon; and French wines *of all sorts, in bottles*, 22 cents a gallon." Same language in act of September 11, 1841, (5 Stats., 464–5.) The revised tariff act of 1842 contains the proviso as to bottles already quoted, *ante* p. 5. The duties under the tariffs of 1846 and 1857 were upon "all wines," indiscriminately. The act of March 2, 1861, was equally sweeping in its declaration that "*all* bottles shall pay a separate duty, whether containing wines, brandies, or other spirituous liquors." So the next act, July 14, 1862, embraces "*all* bottles containing wines subject to ad valorem duties." (12 Stats., 180, 544.) That of June 30, 1864, imposes a duty, partly specific and partly ad valorem, "on wines of all kinds," proportioning the duty to the value of the wine, *with this significant discrimination against such wines as concern this case*, "that no *champagne* or sparkling wines, *in bottles*, shall pay a less rate of duty than" (substantially) 50 cents a quart, whatever might be its value. This discrimination is preserved in the act of 1870, now to be construed, and is carried into the Revised Statutes. The tax is practically on the quantity; $2 a gallon. It is like the "barrel-tax." See 15 Stats., 150, § 59.

In no single statute is there the slightest indication of a legislative intent to favor champagne or sparkling wines because of the peculiar necessities of its manufacture, but in the later enactments the reverse purpose is clearly apparent. They speak of "champagne in bottles," nowhere of "bottles of champagne." It is treated like other wines, as to duty upon the bottles, except that there has been recently a clear discrimination *against* it.

In the section under discussion a duty is first laid "on wines of all kinds, imported in bottles, *and not otherwise herein provided for, the same rate as wines imported in casks*," * * * "and shall pay in addition 3 cents for each bottle." Then it proceeds to impose "on champagne and all other sparkling wines, in bottles" a much higher rate of duty, determinable (mainly) by the *gallon*, and concludes with the proviso, "that wines, brandy, and other spirituous liquors, imported in bottles, shall be packed in packages containing not less than one dozen bottles in each package; and *all such bottles* shall pay an *additional* duty of 3 cents for each bottle."

Two observations, especially, arise upon reading this section: 1st. That, as to the *still* wines, the *same* rate is preserved, whether imported in the cask or the bottle; showing that the tariff is directed toward this manufacture of glass, and not toward its contents; and, 2d, that *because* "champagne and all other sparkling wines, in bottles," are excluded from the first imposition of the duty on the bottles, by being "otherwise herein provided for," that proviso is repeated as to wines at the close of the next paragraph.

The *only* wines mentioned in that paragraph are "champagne and other sparkling wines, *in bottles;*" if the charge upon bottles is not meant to apply to them, then the word "wines" placed before "brandy and other spirituous liquors," in the last proviso, has *no* application to them, and there is no requirement that they shall be imported in packages, instead of by the single bottle, holding a quart, pint, or less. If champagne is a wine, imported in bottles, *and required to be packed in packages of not less than one dozen bottles*, then it must be subjected to "the *additional* duty of 3 cents for each

bottle," to which "*all such bottles*" are liable, *i. e.*, all bottles required to be imported in packages, because containing the specified liquors. It is noticeable that it says that "all such *bottles* shall pay," &c., not all liquors in such bottles, showing again that this duty was placed upon the *vessel* rather than upon its contents.

The plaintiffs' brief has just reached me, as I am correcting the proof of my own. My specific reply to its points must, therefore, be very short.

Upon page 7 the counsel says the act of 1870 purported "to reduce taxation." Yes; but it was "*internal* taxes" that its title declares are to be reduced. It is well known that the policy was to confine these taxes to liquors and tobacco; and that there was no intent to reduce the charges, whether internal or customs, upon liquors.

His italicized statement upon the preceding page, (6,) that no previous duty has been assessed upon the bottle, is answered already by showing that the tax is, in effect, now, upon quantity, $2 a gallon. And as to the italicized quotation, upon page 9, from Taney, 94, we say that, conceding that the charge is upon the article and vessel, the inquiry now comes, *what that charge is?* Suppose in that case the statute had imposed a duty of ten cents on each 56 pounds of salt and *three cents upon each bag* containing it; then it would have been parallel to the one at bar; but Taney, C. J., would not have used the language quoted. In his remarks on pp. 95, 96, Judge Taney overlooked the provision of the act of 1795, cited *ante*, p. 4. The previous proviso, at the close of the preceding paragraph of the section in question, refutes the "first point" of counsel, (on p. 11, repeated

on p. 17,) that "wines" in the last proviso refers to those named as paying duty only by the gallon; had it been intended to apply only to still wines, the proviso would have been put in that paragraph.

If "champagne" is necessarily equivalent to "champagne in bottles," why use the words "in bottles" at all?

The expert must have meant that the bottle is the most convenient vessel for use in making champagne; not that it is as necessary as the skin to the animal.

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